No. —

In the Supreme Court of the United States

OCTOBER TERM, 1940

V. PARKER, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

MOTOR BOAT SALES, INCORPORATED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of E. V. Parker, Deputy Commissioner, United States Employees' Compensation Commission, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in this case on January 6, 1941.

OPINIONS BELOW

The memorandum opinion of the District Court of the United States for the Eastern District of Virginia (R. 54) is not reported. The opinion of

the Circuit Court of Appeals (R. 69) is reported in 116 F. (2d) 789.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 6, 1941 (R. 78–79). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in an action under Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act to enjoin and set aside an award of compensation, a finding of the Deputy Commissioner that the decedent was engaged in maritime employment at the time of his death is conclusive if supported by substantial evidence.

2. If so, whether there is substantial evidence to support the finding in this case.[1]

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424 (33 U. S. C. secs. 902 (2), (4) 903, 905, 921 (b)) are set forth in the Appendix.

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[1] If the petition is granted the Government will also contend that, if the question whether decedent was engaged in maritime or local employment is one for the independent determination of the courts, decedent's employment was maritime and not local and that recovery may not validly be provided by state law.

STATEMENT

The decedent, a negro employee of Motor Boat Sales, Inc., respondent, was drowned when a motor boat in which he was riding overturned on a navigable river (R. 2, 21, 46). The Deputy Commissioner awarded compensation under the Longshoremen's and Harbor Workers' Compensation Act (R. 7). An action to set aside and enjoin the award under Section 21 (b) of the Act (R. 1) was dismissed by the District Court (R. 58). On appeal, the Circuit Court of Appeals for the Fourth Circuit reversed (R. 78). The facts are as follows:

The respondent was engaged in the business of selling small vessels, out-board motors for boats, and maritime supplies (R. 21, 50). The decedent was employed as a janitor and general handy man (R. 25, 28, 45). On the day of the accident, a white mechanic in respondent's employ was duly instructed to test two motors on the river for the purpose of interesting the owners of a boat in the purchase of the motors (R. 36, 40). The decedent was directed to assist the mechanic in attaching the motors to the boat (R. 40), which was pulled up on the shore of the river (R. 38, 46). On this occasion, the decedent was given no instructions to stay off the boat (R. 38, 40, 46–47), although more than eight months previously the respondent had issued general instructions, apparently applicable to all of its employees, not to get on boats in the water (R. 49). The decedent assisted in attaching one

of the motors and accompanied the mechanic on a testing trip (R. 42–43, 46). On returning, this motor was taken off, a second one was installed, and another trip was taken. On this trip, the mechanic drove the boat and the decedent acted as lookout man in the bow (R. 46–47). Since the water was muddy, the action of the decedent helped the mechanic in detecting obstructions (R. 47). The mechanic did not instruct the decedent to stay out of or to get in the boat on either trip (R. 46–47). In the course of the second trip, the boat struck an obstruction, was overturned, and the decedent was drowned. (R. 42.)

So much is undisputed. In addition, there was evidence that respondent's mechanics had previously serviced vessels on navigable waters from time to time (R. 24–25, 31–34), that the only instructions given to decedent were to "help" the mechanic (R. 40), who admittedly was authorized to test the motors on the river, that decedent was subject to the "orders" of the mechanic (R. 29), and that the latter did not in any way instruct decedent to stay out of the boat. The Deputy Commissioner found that on occasions the respondent's mechanics went aboard vessels, serviced them, and tested out ignitions on trips on navigable waters, that the decedent's services were helpful to the mechanic, that the latter, decedent's superior, tacitly approved and acquiesced in such aid, and that the decedent acted in the fur-

therance of his employer's interests and not for his own pleasure and as would be expected of a colored helper under the circumstances (R. 8). The Deputy Commissioner further found that the death arose out of and in the course of the employment, that at the time of his death the decedent was engaged in maritime employment, and that his death occurred upon navigable waters (R. 8). Accordingly, he awarded compensation to the claimants (R. 8–9).

The respondent filed suit under Section 21 (b) of the Act to set aside and enjoin the awards (R. 1). The District Court dismissed the complaint (R. 58).

On appeal, the court below reversed (R. 69). It held that the decedent's employment was a matter of "local concern" and not maritime, that recovery for the death could, therefore, validly be provided by state law (R. 72), and that under the provisions of Section 3 (a) of the Act the claim was accordingly outside the scope of the Act (R. 72, 78). In reaching this decision, the court below made an independent determination of the facts; it concluded that the mechanic's "negative acquiescence" in the decedent's presence in the boat was not a sufficient basis for holding that the decedent was engaged in maritime employment in view of the respondent's instructions not to go on navigable waters in boats (R. 77).

REASONS FOR GRANTING THE WRIT

Section 3 (a) of the Longshoremen's and Harbor Workers' Compensation Act includes within the coverage of that Act disability or death resulting from any injury occurring upon the navigable waters of the United States if recovery therefor "through workmen's compensation proceedings may not validly be provided by State law." Such recovery for an injury occurring upon navigable water may be provided by State law only if the employment was of merely "local concern" because not of "maritime" character. *London Co.* v. *Industrial Comm'n*, 279 U. S. 109. Compare *Sultan Ry. & Timber Co.* v. *Department of Labor*, 277 U. S. 135, 137. In the present case the Deputy Commissioner found that at the time of his death the decedent was engaged in maritime employment (R. 8);[2] the district court sustained this finding (R. 54). The court below, however, treated

[2] That the decedent's employment at the time of his death, if authorized, was maritime and not local seems clear. The business of testing small boats and out-board motors is no less maritime than the repair of completed vessels. So much has been assumed in previous decisions of lower federal courts. *Wood Towing Corporation* v. *Parker*, 76 F. (2d) 770 (C. C. A. 4th); *Wheeler Shipyard, Inc.* v. *Lowe*, 13 F. Supp. 863 (E. D. N. Y.) affirmed, 82 F. (2d) 1022 (C. C. A. 2d); Cf. *Lawson* v. *Maryland Casualty Co.*, 94 F. (2d) 193 (C. C. A. 5th); *St. John* v. *Thomson*, 108 Vt. 66. The fact that decedent was usually employed on land in non-maritime work is immaterial if he was engaged in maritime duties at the time of his death. Cf. *Northern Coal and Dock Co.* v. *Strand*, 278 U. S. 142, 144; *Baizley Iron Works* v. *Spun*, 281 U. S. 222; *Liability Assurance Co.* v. *Cook*, 281 U. S. 233, 236.

the question as one for its independent determination and held that the decedent's employment was local and non-maritime. In thus failing to accord finality to the decision of the Deputy Commissioner, if supported by substantial evidence,[3] the decision below is in probable conflict with *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, and *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162, and presents a question of substantial importance in the administration of the Act.

1. In the *South Chicago* case the Court held that the question whether the decedent was "a member of a crew" was one of fact, on which the finding of the Deputy Commissioner, if supported by substantial evidence, was conclusive; the employer's contention that the provision of the Act excluding "a member of a crew" from its coverage was "jurisdictional," and that the question of its application was, therefore, for the courts,

[3] As appears from the Statement, *supra*, p. 3, the finding of the Deputy Commissioner is amply supported. The court below relied largely on the fact that the respondent had instructed its employees not to go on boats in the water (R. 73, 74, 77). But the Deputy Commissioner could regard that fact as of little weight in view of the facts that respondent's mechanics on a number of occasions serviced boats and motors in the water in furtherance of respondent's business (Cf. *Bull Insular Line, Inc.* v. *Schwartz*, 23 F. Supp. 359 (E. D. N. Y.)) and that the decedent acted with the tacit approval of his superior. Cf. *Maryland Casualty Co.* v. *Cardillo*, 107 F. (2d) 959 (App. D. C.); *Capital Transit Co.* v. *Hoage*, 84 F. (2d) 235 (App. D. C.); *Matter of Corrina* v. *De Barbieri*, 247 N. Y. 357.

was rejected (p. 258). The present case is not distinguishable in principle. The question whether the employee's work is maritime or local is an inquiry of fact of essentially the same character as that whether the employee is a member of a crew. Employment is held to be maritime if the "work has direct relation to navigation or commerce" (*Baizley Iron Works* v. *Span,* 281 U. S. 222, 230; *P. J. Carlin Construction Co.* v. *Heaney,* 299 U. S. 41, 44–45), a test which has acquired precise content with respect to certain familiar and frequently recurring situations (Cf. *Northern Coal and Dock Co.* v. *Strand,* 278 U. S. 142, 144; *Baizley Iron Works* v. *Span, supra*) but which, as the numerous decisions discussed in the opinion below disclose (R. 74), in borderline cases depends for its application on the particular facts. The decision in the *South Chicago* case that the Deputy Commissioner's finding, in applying a strikingly similar test of crew membership, is conclusive if supported by evidence, requires that the administrative determination as to the character of the employment be accorded a like finality.

Since Congress may constitutionally provide compensation for all injuries of employees occurring on navigable waters (*Smith & Son* v. *Taylor,* 276 U. S. 179, 181) the question whether any claim is excepted by the Act from its coverage, whether the exception be of local and non-maritime employment or of members of a crew, may

be left to the primary determination of an administrative agency. *Shields* v. *Utah Idaho Central R. R. Co.*, 305 U. S. 177, 180, 184–185.

2 The holding of the court below that decedent's employment was non-maritime rests largely on its conclusion that decedent's services in the operation of the boat on the river were not authorized by respondent (R. 72–73, 74, 77, see notes 2 and 3, *supra* pp. 6, 7). In this view the issue was practically the same as whether the decedent was, at the time of the injury, acting within "the scope of his employment"; indeed the opinion below employs that very phrase (R. 72, 77). In *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 166, this Court held, however, that the finding of the Deputy Commissioner as to whether the accident arose out of and in the course of employment is conclusive if supported by evidence.[1] The decision below conflicts in principle with this holding; the court below avowedly reweighed the evidence on whether decedent was authorized to go in the boat (R. 76, 73).

3. The substitution of the judgment of the courts for that of the Deputy Commissioner on the issue whether a claim for compensation is within one of the statutory exceptions to the coverage of the Act tends to defeat the purpose of Congress, to provide a "prompt" and "inexpen-

[1] Section 2 (2) of the Act (*infra*, p. 12) defines "injury" as injury "arising out of and in the course of employment."

sive" (*Crowell* v. *Benson*, 285 U. S. 22, 46–47) method for the disposal of claims.[3] This Court has recognized that in order to achieve the statutory aim the determinations of the Deputy Commissioner must be given finality if supported by substantial evidence, at least where no constitutional question of jurisdiction is presented. In *Crowell* v. *Benson, supra*, this Court said (pp. 46–47):

> To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of

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[3] That purpose is clear from the face of the act. Compensation becomes due fourteen days after the employer has knowledge of the injury (Sec. 14 (b)). Where the right to compensation is controverted and an award is made by a deputy commissioner, a penalty of twenty percent is assessed for failure to make compensation within ten days after payment is due (Sec. 14 (f)). *Candado Stevedoring Corp.* v. *Lore*, 85 F. (2d) 119 (C. C. A. 2d); *Arrow Stevedore Co.* v. *Pillsbury*, 88 F. (2d) 446 (C. C. A. 9th). If the employer fails to make payment within thirty days after compensation is due, the deputy commissioner may enter a supplementary order directing payment, on which judgment and execution may be had in the appropriate federal district court (Sec. 18). In order that the burdens, delays, and hazards of litigation may not be used to induce employees to make disadvantageous agreements, any waiver of the right to compensation is forbidden by Congress (Sec. 15 (b)), agreements for compensation without the approval of the Commission are prohibited (Sec. 16), and the district attorney is directed to appear on behalf of the deputy commissioner and defend compensation orders (45 Stat. 490). To minimize the law's delays, the Act prescribes certain limitations on the granting of interlocutory injunctions staying the payment of compensation (Sec. 21 (b)).

> questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent and consequences of the employee's injuries and the amount of compensation that should be awarded.

As the decisions discussed in the opinion below plainly reveal (R. 74), it is difficult, if not impossible, to evolve a rule of law to determine the character of an employment which is sufficiently definite and certain in its application to insure the "prompt" and "inexpensive" disposition of compensation claims by the courts. The question whether the expense and delay incident to litigation of this and similar questions may appropriately be avoided by according finality to the findings of the Deputy Commissioner is one which should be determined by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

APRIL, 1941.

APPENDIX

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424 (33 U. S. C., Secs. 901 *et seq.*) are as follows:

> SEC. 2. (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.
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> * * * * *
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.)
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> * * * * *
>
> SEC. 3. Coverage. (a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *
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> * * * * *
>
> SEC. 5. Exclusiveness of liability. The liability of an employer prescribed in section

904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

* * * * *

SEC. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

* * * * *

SEC. 21. (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district

court for the judicial district in which the injury occurred (or in the Supreme Court of the United States for the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

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